

BRIAN NETTER
Deputy Assistant Attorney General
STEPHANIE HINDS
United States Attorney
MICHELLE R. BENNETT
Assistant Branch Director
REBECCA KOPPLIN, Cal. Bar No. 313970
MICHAEL GERARDI
DANIEL RIESS
Trial Attorneys
United States Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, D.C. 20001
Telephone: (202) 514-3953
Email: rebecca.m.kopplin@usdoj.gov
Counsel for Federal Defendants

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

XAVIER BECERRA, Secretary of
Health and Human Services, *et al.*,

Defendants,

and,

THE LITTLE SISTERS OF THE POOR,
ST. MARY'S HOME, *et al.*,

Defendant-Intervenors

Case No.: 4:17-cv-5783-HSG

JOINT STATUS REPORT

On August 17, 2021, the Court stayed this case and ordered the parties to file status reports every three months. ECF No. 467. The parties report as follows:

1. This case concerns the validity of two rules which create a moral exemption, and expand a religious exemption, to the rules establishing the contraceptive coverage

- requirement. *See* Religious Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,536 (Nov. 15, 2018); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the ACA, 83 Fed. Reg. 57,592 (Nov. 15, 2018).
2. The Court has before it fully briefed dispositive motions, *see* ECF Nos. 311, 366, 368, 370, as well as supplemental briefs addressing the Supreme Court’s decision in *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020), *see* ECF Nos. 433, 435, 437, 438, 440.
 3. On August 16, 2021, Federal Defendants announced that “[t]he Departments [of Health and Human Services, Treasury, and Labor] intend to initiate rulemaking within 6 months to amend the 2018 final regulations and obtaining public input will be included as part of the Departments’ rulemaking process.” CMS.Gov, Frequently Asked Questions, Affordable Care Act Implementation FAQs (Set 48) (Aug. 16, 2021) (available at <https://perma.cc/2XH8-MDBX>).
 4. The Federal Defendants published a notice of proposed rulemaking on February 2, 2023, that would “amend regulations regarding coverage of certain preventive services under the Patient Protection and Affordable Care Act, which requires non-grandfathered group health plans and non-grandfathered group or individual health insurance coverage to cover certain contraceptive services without cost sharing.” U.S. Dep’t of Treasury, U.S. Dept’t of Labor, & Dep’t of Health & Human Servs., *Coverage of Certain Preventive Services Under the Affordable Care Act* (Feb. 2, 2023) (available at <https://perma.cc/L58Q-VY4Q>). The comment period for the proposed rule closed on April 3, 2023. The Federal Defendants received over 44,000 comments to the proposed rule.
 5. The Court held its most recent status conference in this matter on February 7, 2023. After the conference, the Court (1) ordered that the case should remain stayed and (2) directed the parties to attach to the next joint status report any

1 comments on the notice of proposed rulemaking submitted by Plaintiffs or
2 intervenors. ECF No. 489.

3 6. The parties filed a status report with the comments of the Plaintiffs and intervenors
4 on the notice of proposed rulemaking on May 1, 2023. ECF No. 493.

5 7. The Federal Defendants can report that review and assessment of the comments
6 to the proposed rule, including comments from Plaintiffs and Intervenor, is
7 ongoing. Federal Defendants propose that the case remain stayed and that Federal
8 Defendants continue to file status reports every 90 days to apprise the Court of
9 the status of the rulemaking and their position on the need for a continued stay.
10 The next status report would therefore be due on January 29, 2024.

11 8. Plaintiff States do not oppose the case remaining in its current posture.

12 9. Intervenor-Defendant March for Life concurs in the federal government's
13 proposal of a continued stay.

14 10. Intervenor-Defendants The Little Sisters of the Poor maintain their position from
15 prior filings that the stay should be lifted—at least as to the religious conscientious
16 exemptions—and the Little Sisters' motion for summary judgment decided.
17 Plaintiff States' lawsuit with respect to the religious exemptions was already
18 futile, but it has become even more futile in light of the Ninth Circuit's recent en
19 banc decision in *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*
20 *Bd. of Educ.*, 82 F.4th 664 (9th Cir. 2023) (en banc). In *FCA*, the Ninth Circuit
21 recognized "three bedrock requirements of the Free Exercise Clause that the
22 government may not transgress." *Id.* at 686. "First, a purportedly neutral generally
23 applicable policy may not have a mechanism for individualized exemptions.
24 Second, the government may not treat comparable secular activity more favorably
25 than religious exercise. Third, the government may not act in a manner hostile to
26 religious beliefs or inconsistent with the Free Exercise Clause's bar on even
27 'subtle departures from neutrality.'" *Id.* (cleaned up). What the Plaintiff States
28

1 have asked for in this case would violate all three of those bedrock requirements.
2 Continuing to wait for the Federal Defendants' Godot thus serves no purpose and
3 is deleterious to the rule of law. Indeed, as Intervenor-Defendants The Little
4 Sisters recently explained to the Supreme Court, this lawsuit (and its now six-year
5 pendency) epitomizes the brokenness of the federal regulatory process as it
6 intersects with the civil rights of religious people. *See* Amicus Br. of The Little
7 Sisters of the Poor, *Loper Bright Enterprises v. Raimondo*, No. 22-451, at 1-2
8 (filed July 24, 2023). No other area of civil rights litigation experiences the years-
9 long delays in this case, all based on the thinnest of regulatory reeds. Plaintiffs'
10 and Federal Defendants' charade thus casts a negative light on this Court while
11 allowing them to avoid any accountability. The Court should therefore resolve the
12 challenges to the religious exemption.
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: October 30, 2023

Respectfully submitted,

2 BRIAN NETTER
Deputy Assistant Attorney General

3 STEPHANIE HINDS
4 United States Attorney

5 MICHELLE R. BENNETT
Assistant Branch Director

6 /s/ Rebecca Kopplin
7 REBECCA KOPPLIN
8 Cal. Bar No. 313970
MICHAEL J. GERARDI
9 DANIEL RIESS
Trial Attorneys
10 United States Department of Justice
Civil Division
11 Federal Programs Branch
1100 L Street NW
12 Washington, D.C. 20001
Telephone: (202) 514-3953
Email: rebecca.m.kopplin@usdoj.gov
13 *Counsel for Federal Defendants*

14 /s/ Mark L. Rienzi
15 Eric C. Rassbach – No. 288041
Mark L. Rienzi – *pro hac vice*
16 Lori H. Windham – *pro hac vice*
Diana Verm Thomson – *pro hac vice*
17 Adèle Auxier Keim – *pro hac vice*
18 Daniel L. Chen – No. 312576
The Becket Fund for Religious Liberty
19 1919 Pennsylvania Ave. NW, Suite
400
20 Washington, DC 20036
Telephone: (202) 955-0095
21 Facsimile: (202) 955-0090
erassbach@becketlaw.org
22 *Counsel for Defendant-Intervenor The*
23 *Little Sisters of the Poor*

Respectfully submitted,

ROB BONTA
Attorney General of California
KATHLEEN BOERGERS
Supervising Deputy Attorney General
KATAKEE KANE
Deputy Attorney General

/s/ Karli Eisenberg
KARLI EISENBERG
Supervising Deputy Attorney General
*Attorneys for Plaintiff the State of
California*

WILLIAM TONG
Attorney General of Connecticut
MAURA MURPHY OSBORNE
Assistant Attorney General
*Attorneys for Plaintiff the State of
Connecticut*

KATHLEEN JENNINGS
Attorney General of Delaware
CHRISTIAN DOUGLAS WRIGHT
Director of Impact Litigation
JESSICA M. WILLEY
Deputy Attorney General
*Attorneys for Plaintiff
the State of Delaware*

BRIAN SCHWALB
Attorney General of the
District of Columbia
KATHLEEN KONOPKA
Deputy Attorney General,
Public Advocacy Division
*Attorneys for Plaintiff the District of
Columbia*

LOIO KUHINA
Attorney General of Hawaii
ERIN N. LAU
Deputy Attorney General
*Attorneys for Plaintiff
the State of Hawaii*

KWAME RAOUL
Attorney General of Illinois
HARPREET K. KHERA
Deputy Bureau Chief,
Special Litigation Bureau

ELIZABETH MORRIS
Assistant Attorney General,
Special Litigation Bureau
*Attorneys for Plaintiff
the State of Illinois*

ANTHONY G. BROWN
Attorney General of Maryland
CAROLYN A. QUATTROCKI
Deputy Attorney General
STEVE M. SULLIVAN
Solicitor General
KIMBERLY S. CAMMARATA
Director, Health Education
and Advocacy
*Attorneys for Plaintiff
the State of Maryland*

KEITH ELLISON
Attorney General of Minnesota
JACOB CAMPION
Assistant Attorney General
*Attorney for Plaintiff
the State of Minnesota,
by and through its
Department of Human Services*

LETITIA JAMES
Attorney General of New York
LISA LANDAU
Bureau Chief, Health Care Bureau
STEVEN C. WU
Deputy Solicitor General
*Attorneys for Plaintiff
the State of New York*

JOSHUA H. STEIN
Attorney General of North Carolina
SRIPRIYA NARASIMHAN
Deputy General Counsel
*Attorneys for Plaintiff
the State of North Carolina*

PETER F. NERONHA
Attorney General of Rhode Island
MICHAEL W. FIELD
Assistant Attorney General
*Attorneys for Plaintiff
the State of Rhode Island*

CHARITY R. CLARK
Attorney General of Vermont
ELEANOR SPOTTSWOOD
Assistant Attorney General

*Attorneys for Plaintiff
the State of Vermont*

ROBERT F. FERGUSON
Attorney General of Washington
JEFFREY T. SPRUNG
Assistant Attorney General
*Attorneys for Plaintiff
the State of Washington*

Respectfully submitted,

ELLEN F. ROSENBLUM
Attorney General of Oregon
/s/ J. Nicole DeFever
(as authorized on 5/1/2023)
J. NICOLE DEFEVER,
CA Bar No. 191525
Senior Assistant Attorney General
*Attorneys for Plaintiff-Intervenor
the State of Oregon*

/s/ Kenneth J. Connelly
KENNETH J. CONNELLY, AZ Bar
No. 25420
Alliance Defending Freedom
15100 N. 90th Street
Scottsdale, AZ 85260
Telephone: (480) 444-0020
Facsimile: (480) 444-0028
Email: kconnelly@ADFlegal.org
*Counsel for Defendant-Intervenor
March for Life Education and Defense
Fund*